No. 83-307

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KETCHIKAN PULP COMPANY,
Petitioner,

v.

REID BROTHERS LOGGING COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The petition for a writ of certiorari filed by Ketchikan Pulp Company ("KPC") is without merit and should be denied. KPC has incorporated by reference the arguments made in the petition for certiorari filed by its co-defendant in the same case, Alaska Lumber & Pulp Company ("ALP"), Cause No. 83-301 in this Court, and ALP similarly has incorporated KPC's arguments. Accordingly, Reid Brothers Logging Company ("Reid Brothers"), the respondent herein, submits this brief in opposition to be read together with its brief in opposition to the related petition. For the sake of clarity, this brief should be read first and respondent's brief in opposition to ALP's petition should be read second.[1]

[1] The following abbreviations are used herein: The petitioners' Joint Excerpt of Record in the court of appeals is cited as "ER" herein, the Supplemental Excerpt of Record as "SER," the repor-

STATEMENT OF THE CASE

This is a case, commenced eight and a half years ago, in which a relatively small private enforcement action exposed a massive conspiracy and monopolization which had operated successfully for many years in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). The complaint, filed by Reid Brothers on March 13, 1975 (ER 1-15), charged the defendants KPC and ALP with conspiring to restrain trade in, conspiring and attempting to monopolize, and actually monopolizing, the timber industry in Southeast Alaska.

The case was assigned to the late Hon. Morell E. Sharp, United States District Judge. Four subsequent suits of a similar nature (two by independent loggers and two by operators of small sawmills) were consolidated by Judge Sharp with the Reid Brothers action for discovery and pretrial purposes (CR 105, 112). The defendant pulp mill companies employed what has aptly been called the "stonewall defense" throughout the litigation. They resisted on every issue, filed motion after motion seeking to prevent the case from going to trial, and refused to concede facts even in the face of irrefutable evidence. Massive discovery was necessary. In 1978 the defendants filed a voluminous set of motions, including a motion to strike plaintiff's jury demand[2] and eleven summary judg-

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ter's transcript "RT," the district court clerk's record as "CR," trial exhibits as "Ex," and the district court's findings of fact as "FF." Evidentiary references are generally given to "ER" pages which summarize the evidence and contain specific citations to trial testimony and exhibits; in some instances references are made directly to the latter. The appendix to KPC's petition is cited as "KPC App." and that to ALP's petition as "ALP App."

[2] Defendants' motion to strike plaintiff's jury demand was accompanied by extensive arguments that the case must be tried to the

ment motions (seven of which sought partial or total summary judgment as to the Reid Brothers case). Judge Sharp denied all but one of these motions (partial summary judgment on the statute of limitations was granted on the damage claim of one of the other plaintiffs) and stated in his order of November 22, 1978 (SER 48, 52-53):

> The Court finds that there is sufficient evidence available that shows that defendants communicated with each other and participated in common practices so as to lay the groundwork for a reasonable inference of price stabilization. . . . There is evidence available from which one could reasonably infer that defendants entered into a comprehensive timber agreement benefitting both parties . . .

After the pretrial order was lodged (ER 45), defendants filed an additional battery of motions. (CR 407, 409, 435, 504.) By the spring of 1980, the Reid Brothers case had been pending for five years. Because of Judge Sharp's illness, the Alaska timber cases were transferred to the Hon. Barbara J. Rothstein, United States District Judge. (SER 62.) Judge Rothstein ruled on the defendants' motions (CR 468, 471, 527) and set the Reid Brothers case for trial on July 28, 1980. In all, the defendants filed and briefed sixteen pretrial motions seeking to avoid trial in whole or in part. The district court docket contains 1,044 entries. (ER 2454-92.)

The trial began on August 4, 1980, and continued through forty-one trial days until mid-November, 1980. Sixty persons testified in person or by deposition; 1,291 exhibits were admitted into evidence; and more than

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court. Later, when faced with a trial date the certainty of which depended upon the case being tried to the court, ALP reversed its field and demanded a jury. The invalidity of ALP's belated demand is discussed in the brief opposing its petition for certiorari.

6,000 pages of trial transcript were developed. At the court's direction extensive post-trial briefs and proposed findings were filed by all parties. On March 5, 1981, the district court rendered its oral decision, finding that Reid Brothers had sustained its burden of proof with respect to every material violation alleged in the pretrial order. Judge Rothstein stated (ER 2404-5):

> The Court believes that the proof in this case has overwhelmingly established that the defendant mills, both KPC and ALP, conspired to restrain trade and to monopolize the timber industry in Southeast Alaska. The Court feels that the evidence establishes that the two mills achieved monopoly power and exercised this power.

Two months later the court circulated draft findings and conclusions and invited comment by all counsel. After considering the parties' comments, the court entered thorough and detailed findings of fact and conclusions of law. (ER 2416-2449.) On June 22, 1980, more than six years after the action was commenced, judgment was entered for Reid Brothers and against KPC and ALP in the amount of $496,627, trebled to $1,489,881. (ER 2450.)

The pulp mill companies appealed to the Court of Appeals for the Ninth Circuit. That court affirmed on March 1, 1983, and, in the course of holding that the evidence fully supported the findings of petitioners' Sherman Act violations, remarked on the "overwhelming evidence of wrongdoing in this case." 699 F.2d 1292, 1297 n.4.

The defendants sought a rehearing by the court of appeals en banc. That petition was submitted to the full court and no judge requested a vote thereon. Accordingly, the petition for rehearing was denied. (KPC App. A-69.)

The four related Alaska timber cases were settled as to one defendant (KPC) after the Reid Brothers trial, and were settled as to the other defendant (ALP) after the Ninth Circuit's affirmance.

SUMMARY OF ARGUMENT

This summary condenses the responses to petitioners' arguments herein and in the companion petition, No. 83-301.

The defendants' argument that the district court and court of appeals found that they had conspired in violation of Sherman Act §§ 1 and 2 "based solely upon (1) a variety of legitimate business and personal contact, plus (2) similar but not consciously parallel conduct" is untenable. The conspiracy in fact was proved by abundant evidence both direct and circumstantial; it was carried out by a combination of explicit communications between the defendants and consciously interdependent action; and it employed a variety of methods of destroying competition. Standard antitrust conspiracy law was applied by the district court and the court of appeals.

The petitioners' argument over standards for "predatory pricing" is not even raised by the record. This is a conspiracy case, not a single-actor attempt-to-monopolize case such as those relied upon by defendants. As part of their conspiracy the defendant pulp mills bid preclusively on timber sales, each in its collusively-set "operating area," to keep out would-be competitors for logs. It was not necessary to allege or show any mathematical relationship between defendants' costs and the amounts of their bids where the bidding to exclude other mills was part and parcel of a horizontal conspiracy to restrain trade and monopolize.

The argument that KPC's offer to Reid Brothers was "better-than-competitive" is not only over a question of fact, unsuitable for review by this Court, but is utterly specious. The offer in fact was far worse than what respondent would have experienced in a market free of defendants' collusive trade restraints because it embodied a flat three-year price which deprived the seller of periodic price increases which, under competitive conditions, would have resulted from rising end product values. The court of appeals has correctly affirmed the district court's finding that, but for the defendants' antitrust violations, Reid Brothers would have logged the Muddy River No. 3 sale as a purchase logger selling to one or more buyers at prices fluctuating periodically with end product values.

The argument that the statute of limitations was not observed is plainly incorrect in light of the well-established rule that evidence predating the limitations period is admissible to show the origins and nature of the conspiracy. The defendants committed injury-causing acts within the limitations period, and plaintiff was properly awarded as damages the difference between what is actually experienced in its dealing with KPC and what it would have experienced but for the defendants' antitrust violations.

The defendant KPC expressly stipulated in open court to a bench trial of this case several weeks before the trial began. Both defendants had repeatedly moved to strike plaintiff's jury demand, requested a trial to the court even after the Reid Brothers case was designated to be tried separately, and even argued that a jury trial would deprive them of due process of law. The district court correctly ruled that ALP had not relied upon plaintiff's jury demand, which was withdrawn in order to obtain a

trial date under conditions of calendar congestion, and that both defendants had waived any claim to a trial by jury. The court of appeals has correctly affirmed on the basis of established law that the right to a trial by jury is not absolute but may be waived expressly or by conduct.

ARGUMENT

A. Standard Of Review

The petition of KPC, like that of ALP, consists largely of attempts to re-argue fact issues which were resolved against defendants in the district court. The applicable standard of review is set forth in Fed. R. Civ. P. 52(a), which provides:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The court of appeals, affirming "[a]fter a careful review of the extensive record", 699 F.2d at 1295, has found the district court's findings of conspiracy, monopolization, and damages to be fully supported by the evidence, stating, *inter alia:*

> The refusal of the defendants to compete for timber sales offered by the USFS or logs marketed by independent loggers was part of a general scheme to reduce the costs of timber acquisition and thereby increase the spread between costs to the defendants and the prices received for end products.
>
> * * *
>
> This division of the market, sustained by an uninterrupted pattern of communications up through 1975, resulted in a remarkable record of bidding restraint by the defendants.
>
> * * *

The evidence also supports the district court's finding that the defendant blocked the establishment of competing mill facilities by using covertly controlled corporations ("fronts") to bid preclusively on USFS timber sales.

* * *

Finally, the evidence shows that KPC and ALP conspired to pay artificially low prices to loggers. By calculating payments to loggers on the basis of the loggers' costs rather than the value of the logs, ALP and KPC created a network of "captive" loggers heavily indebted to the defendants. With a drop of the executioner's sword, the defendants could cut off a logger's financing, force the logger out of business, and acquire the company or its assets.

* * *

We find that this unlawful agreement constituted a restraint on interstate and foreign commerce in violation of § 1 of the Sherman Act.

* * *

The evidence supports the finding of the district court that the defendants violated § 2 of the Sherman Act.

* * *

The district court correctly defined the relevant geographic and product markets and found that the defendants combined to possess over a 90 percent share in those markets. The above-cited evidence shows the existence of a conspiracy based on an intent to monopolize and the occurrence of several overt acts in furtherance of that conspiracy.

* * *

> The finding of the district court that KPC unlawfully imposed a multi-year, non-negotiable contract on RBLC for the sale of the Muddy River logs is substantially supported by the evidence.
>
> * * *
>
> Furthermore, the evidence also supports the critical finding of the district court that contractual log prices between a purchase logger and a log buyer would have been renegotiated at least annually in an unrestrained market.

699 F.2d at 1296, 1297, 1298, 1299, 1300, 1301.

The petitioners' argument here that the district court "mechanically adopted" the findings proposed by respondent is untenable. During the half-year between the closing of the evidentiary record and the entry of the findings, the district judge considered over 2,000 pages in post-trial submittals, as well as the trial record itself. The findings clearly represent "the district court's own deliberations," *AMF Inc.* v. *Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979). They contain many paragraphs not based upon any party's submittals. Comparison of plaintiff's proposed findings and those entered by the court (CR 841 and ER 2416-49) reflects the numerous changes made by the trial judge from the findings proposed by respondent.

B. The Parties

Reid Brothers, an Alaska corporation, was formed in 1946 by five members of the Reid family, residents of Petersburg, Alaska. From and after 1968, the sole owners were Glenn and Martha Reid. (FF III.A, ER 2417). Reid Brothers was engaged in business as an independent logger. Its reputation for ability and integrity was of the highest. 699 F.2d 1301, 1302 n.15. Defendant KPC, a

Washington corporation, was formed as a joint subsidiary of lumber, pulp, and rayon manufacturers. Its parents at various times were American Viscose Corporation, Puget Sound Pulp and Timber Company, Georgia Pacific Company ("G-P"), FMC Corporation ("FMC"), and Louisiana-Pacific Corporation ("L-P"). KPC commenced its pulp mill operation in Southeast Alaska in 1954. Defendant ALP was formed as a subsidiary of Alaska Pulp Company, Ltd. ("APC"), a Japanese-owned corporation, which in turn was and is held by numerous companies engaged in rayon manufacture, pulp and paper manufacture, banking, trading, and other commercial and industrial activities. (FF III.C, ER 2418.) ALP commenced its saw mill operation in Southeast Alaska in 1954, when it acquired Wrangell Lumber Company ("WLC"), and began its pulp mill operation in 1959.

C. History Of Defendants KPC And ALP

KPC and ALP acquired their 50-year allotments from the Forest Service in 1951 and 1957, respectively. (ER 635.) It was the intention of the Forest Service that both defendant mills would comply with all federal laws and regulations, including the antitrust laws. (ER 635.) It was expected that the two would compete for independent timber sales, and for logs purchased from independent loggers, to fill out their log requirements. (ER 650.) The defendants have not claimed to be exempt from the antitrust laws, and it is clear as a matter of law that they could not be.

The defendants functioned primarily as suppliers to the entities which owned them. Because of the predominance of non-arm's-length sales to affiliated entities the court found it was impossible to determine accurately the values of the end products to the defendant mills. (FF V.B.1-3.)

KPC sold approximately 80% of the pulp which it manufactured to its parent, FMC (ER 635.) FMC received substantial price discounts. Moreover, both of KPC's parents received fees and commissions which, although deducted as "expenses," really amounted to draws and were kept approximately equal by periodic adjustments. (FF V.B.1-3; ER 635.) KPC's operations generated large amounts of cash and were profitable even after the millions in fees and commissions paid to its parents. KPC's profits in the first half of 1973 increased by 165% over the 1972 rate, and the company forecast a cash buildup from $768,000 at June 30, 1973, to $17,587,000 at June 30, 1974. (ER 636.) During the week of September 10, 1973—the same week KPC shut down Reid Brothers' logging operations—executives of L-P and FMC met to discuss KPC's enormous profitability. (Ex. 1003, SER 207.) In January, 1975, L-P valued KPC "in the range of $275,000,000" while its cost basis in KPC was only $6,000,000 for one-half ownership. (Ex. 934, SER 224.)

ALP and its related sawmills (WLC and Alaska Wood Products) similarly functioned as suppliers to ALP's parent company, APC, which in turn resold ALP's product to its shareholders. APC in Tokyo determined the prices at which logs were transferred between ALP's Woods Division and its Mill Division. (ER 637.) APC purchased all of the pulp produced by ALP and set the price for it. (ER 637.) APC also purchased all lumber products produced by the WLC and AWP sawmills. (ER 637.) APC in turn resold the pulp and lumber products to its shareholders, which then used or resold the products to users in Japan. (ER 637.) The profits of the shareholders on resale were not made available. (ER 637.)

In 1972, G-P considered trying to acquire ALP, and Harry Merlo, then vice-president of G-P, wrote after meeting with Hisaya Hiromatsu, one of ALP's top officials (ER 639):

> The owners of APC have really never paid a fair price for their dissolving pulp so the true financial picture of Alaska Pulp Company reflects this subsidizing.

Similarly, KPC's timber manager, Mr. Brooks, wrote that "the Japanese operations are gong to be manipulated so that any profit therefrom is taken in Japan and there will be little or no taxes paid to the State of Alaska or the Federal Government." (ER 639.) As a result of such manipulations, ALP generally showed paper losses during most of the years to 1973, but the figures did not represent economic reality. (ER 639-40.) In 1973-74, when Reid Brothers was operating the Muddy River No. 3 timber sale, and despite the understatement caused by the bookkeeping devices described above, ALP's records showed substantial profits. (ER 640.)

The Forest Service concluded that it was unable to determine the true value of end products manufactured by the defendants and sold in Japan. (ER 638.)

D. The Defendants' Conspiracy Was Pervasive, And Must Be Viewed As A Whole

The district court has found that KPC and ALP engaged in a conspiracy

> . . . the purposes and the actual effects of which have been: to restrict and eliminate competition in all phases of the timber industry in Southeast Alaska; to refrain concertedly from competing against each other for timber or logs; to keep would-be competitors out of Southeast Alaska by cutting off their timber supplies through preclusive bidding and other means; to eliminate mill competition by acquir-

> ing ownership or control of the sawmills in Southeast Alaska, while expanding their own operations; to control and manipulate the log supply to the few surviving mills; to pay artificially low prices to independent loggers for logs and logging services; to eliminate purchase loggers from the field; and to attain and exercise monopoly power, *i.e.*, the power to set prices and exclude competition, in the timber industry in Southeast Alaska.

(FF VI.)

The court of appeals has held in this regard, 699 F.2d at 1298, n.7:

> The defendants' challenges to the district court's conclusion that a § 1 conspiracy existed are totally without merit. The defendants' attempts to isolate and attack particular portions of the district court's opinion not only ignore the weight of the evidence, but display an apparent inability to interpret certain portions of the district court order. . . .

The district court further found (KPC App. A-43) that

> [e]ach part of the defendants' combination and conspiracy interlocked with every other part, and was aimed at the same goal of restricting and eliminating competition in the timber industry in Southeast Alaska.

That finding is clearly compelled by the evidence. Each part of the defendants' combination and conspiracy reinforced the other parts—for example, defendants' exclusion of other mills eliminated competition for logs and logging services, which facilitated defendants' control of loggers through their system of administered prices and debt accounts, which brought about the elimination of independent loggers, which in turn extended defendants' monopoly power and made it impossible for other mills to compete in Southeast Alaska, and so on—and each part

was aimed at the same goal of restricting and eliminating competition.

The law requires that every conspiracy be judged as a whole. *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690, 699 (1962); *Beltz Travel Service* v. *Int'l Air Transport Ass'n*, 620 F.2d at 1366-67 (9th Cir. 1980). Thus, where a plaintiff is injured by one facet of a multi-faceted conspiracy he is entitled to damages regardless of whether the other facets of the defendants' collusion had any economic impact on him. *Washington State Bowling Proprietors Ass'n* v. *Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966), *cert. denied*, 384 U.S. 963 (1966). It does not matter that individual acts, conduct, agreements or practices might otherwise be lawful if viewed in isolation; their vice is their use in the aggregate to achieve the unlawful purpose. *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964). Otherwise innocent acts are unlawful when they are part of the sum of acts relied upon to accomplish an unlawful objective. *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946).

E. Standard Of Proof In Sherman Act Cases

The Sherman Act is a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4-5 (1958). The statute is designed to sweep away all appreciable obstructions so that the policy of free trade may be effectively achieved. *Greyhound Computer Corp.* v. *Int'l Business Machines Corp.*, 559 F.2d 488, 504 n.37 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978). To carry out this mandate for open competition, Congress established the private treble-damage action as a principal means of enforcing the Sher-

man Act for the public benefit as well as to compensate injured parties. *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. 100, 130-31 (1969); *Olympic Refining Co.* v. *Carter*, 332 F.2d 260, 264 (9th Cir. 1964), *cert. denied*, 379 U.S. 900.

A combination or conspiracy is formed within the meaning of Section 1 of the Sherman Act if the participants have a common objective to effect an unlawful purpose, and there is some agreement or course of conduct undertaken by the participants to accomplish the objective. *E.g.*, *Kiefer-Stewart Co.* v. *Joseph Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Interstate Circuit* v. *United States*, 306 U.S. 208 (1939); *Esco Corp.* v. *United States*, 340 F.2d 1000 (9th Cir. 1965). It is not necessary to find an express agreement in order to find a conspiracy. A tacit understanding is enough. It is sufficient that concert of action was contemplated and the defendants conformed to the arrangement. *United States* v. *Paramount Pictures*, 334 U.S. 131, 142 (1948); *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600 (1914); *Pacific Coast Agr. Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196, 1203 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). This rule was applied in *United States* v. *Champion International Corp.*, 557 F.2d 1270, 1272-73 (9th Cir. 1977), *cert. denied*, 434 U.S. 938, where the court affirmed the criminal convictions under the Sherman Act of Oregon lumber firms which had conspired to eliminate competition in bidding for timber offered for sale by the U.S. Forest Service.

Whether the defendants' agreement is express or implied, it is well established that either circumstantial or direct evidence can be sufficient to prove it. The essential

combination or conspiracy in violation of the Sherman Act may be inferred from a course of conduct of dealing or other circumstances as well as from an exchange of words. *American Tobacco Co.* v. *United States*, *supra*, 328 U.S. 781, 809-810 (1946); *United States* v. *Masonite Corp.*, 316 U.S. 265 (1942); *Interstate Circuit* v. *United States*, *supra*, 306 U.S. 208 (1939). Most antitrust conspiracies are proved entirely or in large part by inferences drawn from the defendants' conduct. *Esco Corp.* v. *United States*, *supra*, 340 F.2d at 1007 (9th Cir. 1965); *Girardi* v. *Gates Rubber Co. Sales Div., Inc.*, 325 F.2d 196, 200 (9th Cir. 1963).

The evidence here was both direct and circumstantial. It showed the defendants' combination and conspiracy in restraint of trade, and monopolization, so conclusively that if this were a criminal case they would surely have been convicted. Their trade restraint was destructive in its methods and pervasive in its effects.

F. The Pattern Of Collusive Communications And Joint Projects Between KPC And ALP; Petitioners' Arguments Over The Statute Of Limitations Are Without Merit

The court has found that "[d]espite their position as competitors, ALP and KPC maintained a pattern of communication concerning their respective business operations, and of entering joint projects in procurement and marketing." (FF VII.2.) The evidence of systematic communication and cooperation between competitors, summarized in sixteen findings, provides the factual setting in which the remaining evidence of conspiracy should be viewed.[4]

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[4] The courts recognize that collusive market control can be more readily accomplished in a market dominated by only a few competitors. *E.g.*, *United States* v. *Container Corp. of America*, 393 U.S.

Defendants' argument that the evidence included events predating the statute of limitations period, as well as events within the period, is misplaced. It is well settled that plaintiff is entitled to plead and prove the whole conspiracy, including its genesis and development before the four-year damage period. *E.g., Continental Ore Co.* v. *Union Carbide Corp., supra*, 370 U.S. 690, 709-710 (1962). Similarly, in a Section 2 case the court ordinarily receives evidence showing the history of the monopolization. *E.g., Baush Machine Tool Co.* v. *Aluminum Co. of America*, 72 F.2d 236, 239 (2d Cir. 1934), *cert. denied*, 293 U.S. 589.

KPC's collusion with ALP began when the latter was first preparing to start operating its pulp mill. In 1959, KPC sent ALP confidential information on prices it intended to pay to loggers for logs. (ER 642-43; Ex. 498, SER 100.) An ALP memorandum of April 6, 1959, stated (ER 643):

> These prices were supplied by an employee of Ketchikan Pulp Co. and should be held in the strictest confidence, if we are to maintain our contacts for this type of price information.

Over the ensuing years, the defendants engaged in many joint projects. Illustrative are a fraudulent pricing arrangement on inter-defendant sales of cedar logs whereby they used a dual invoicing system to conceal the true price from the Forest Service and the public in order to depress stumpage values (ER 645-47; FF VII.13, ER 2429); a joint venture to share, and avoid bidding on, the timber from the best spruce area in the region (ER 644); and KPC's giving "preference" to ALP on its spruce and

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333 (1969); *Gainesville Utilities Dep't* v. *Florida Power and Light Co.*, 573 F.2d 292 (5th Cir. 1978), *cert. denied*, 439 U.S. 913.

cedar sales (ER 644.) Over the years KCP and ALP exchanged information on independent timber sales, log supply, stumpage rates, towing rates, wage levels, log production, allotment reinventories, round log exports, the possible entry of new mill competitors, and other subjects.

G. The Defendants Concertedly Refused To Compete Against Each Other For Timber Or Logs, And Divided The Market By Agreement

Judge Sharp noted in denying the summary judgment motions that "[d]efendants' territorial division and their cooperation in the cedar export market show that each defendant benefited from the other's actions." (SER 53.) Judge Rothstein following trial found (FF VIII.B.1-3, emphasis added):

> 1. In a competitive marketplace, KPC and ALP, faced with this chronic shortage and an ongoing concern over supply, would have competed vigorously for independent timber sales and for logs produced by independent loggers. Instead, *the defendants refused to compete against each other for independent sales or for logs throughout the period 1959-1975.*
>
> 2. The defendants' motives for refusing to compete were to minimize costs, to avoid paying competitive stumpage prices which could lead to competitive prices to loggers for logs, and *to avoid paying competitive prices* which could lead to reappraisal of their long-term allotment prices at higher levels.
>
> 3. The said course of conduct by the defendants was *deliberate and interdependent. Each defendant refrained from competing against the other for timber sales and logs in reliance upon the other's reciprocal refusal to compete; competition inaugurated by either defendant would have required the other to act competitively as well in order to insure a supply.*

Throughout the period 1959-75, KPC and ALP were chronically short of timber. They were also at times acutely short of logs. (ER 650-54.) While both defendants needed more and more timber from outside their allotments, they were able to obtain less and less. (ER 654.) Had they behaved competitively rather than collusively, KPC and ALP would have competed vigorously for independent timber sales and for logs produced by independent loggers. Instead, they collusively refused to compete against each other throughout the period 1959-75. (ER 655-67, 1804-15.)

When ALP entered the market, KPC pulled back in areas where it had traditionally procured timber, and the two pulp companies thereafter confined themselves generally to mutually-observed "operating areas," thus avoiding competition. (ER 655-659.) KPC did not normally bid for timber within ALP's area once ALP entered the picture. (ER 656.) The documents confirm that each defendant would refrain from bidding *because* a sale was in the other's operating area. (*E.g.*, ER 656-7, Ex. 447.)

Even as the timber shortage grew more severe, KPC persisted in avoiding competition by staying out of ALP's operating area, and vice versa. (ER 657.) A remarkable confirmation of the defendants' collusive division of the market is set forth in Exhibit 361 (SER 220), a 1974 confidential memorandum by Mr. Finney, KPC's timber manager in the mid-70's, to Mr. Murdey, the company's vice president. Finney worked up a proposal whereby the existing division of territory between ALP and KPC would be modified. (ER 658.) It is a striking fact that in considering this change KPC did not discuss plunging into competition with ALP, but rather wrote up a proposal to modify, through agreement with its competitor, an existing collusive division of the market. (ER 658-659.)

Over the period 1959-75, hundreds of millions of board feet of valuable timber went to each defendant with no competition whatever from the other. (ER 660-67.) The record of bidding on independent timber sales reveals the unmistakable pattern of the defendants' collusion. (ER 664-6, 1811-12.)

Defendants' refusal to compete embraced the procurement of both cut logs and standing timber. Although loggers and logs were much in demand (ER 650-54, 666, 741-49, 1850-54), neither defendant ever made an offer to buy logs from a logger which it understood was selling logs to the other. (ER 666.)[4] The defendants knew their refusal to compete resulted in the loggers receiving noncompensatory prices. Mr. Brooks wrote to KPC's president in 1969 (ER 667):

> On the other hand, we are deterred from establishing a realistic log price by our fear that it will be reflected in Forest Service stumpage rates. . . .

On August 21, 1972, ALP wrote in the Minami report (Ex. 692, SER 169) that the log price "has been and is inappropriate." The log prices were not only "inappropriate" and less than "realistic," they were far less during the damage years than unrestrained market prices would have been, and this was a direct result of the defendants' antitrust violations.

Defendants' concerted allocation of the market, constituting one part of their conspiracy, was a violation of

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[4] ALP's oral engagement of Reid Brothers to do *contract* logging at a difficult site on its allotment at Zarembo Island was not an exception to defendants' refusal to compete. Plaintiff logged briefly at Zarembo and then ceased; at ALP's prices, four other loggers were also unable to log economically at that location. (ER 1813, n.5; RT 10:181-83.)

Sherman Act § 1. Concerted division of customers, territories, or markets is unlawful *per se*. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 (1958); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951). Similarly, agreements or understanding of competitors not to compete for customers are unlawful *per se*. *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961). Concerted allocation of markets by purchasers of raw materials are equally unlawful as concerted allocation of customers by sellers of a commodity. *American Tobacco Co.* v. *United States*, *supra*, 328 U.S. 781 (1946).

H. The Defendants Concertedly Kept Outside Mills From Establishing Competitive Facilities By Cutting Off Their Timber Supply Through Preclusive Bidding And Other Means

Throughout the 1960's and early 1970's, the Forest Service actively encouraged the establishment of independent sawmills and veneer (plywood) mills in Southeast Alaska, that is, facilities which would be independent of and in competition with defendants KPC and ALP. (ER 668.) However, ALP and KPC concertedly prevented the would-be entrants from establishing competitive mills. While the defendants collusively refused to bid against each other, each relied on the other to bid preclusively against outsiders in its own "operating area," thus excluding competition from the entire Tongass Forest. (ER 668-76; FF IX. 1-13.) The associate chief of the Forest Service reported that "[t]he two established pulp companies have bid preclusively to keep out western Washington and Columbia River plywood mills." (ER 671.) By this means the defendants blocked the efforts of several veneer and plywood companies to

enter the field; none was able to obtain a timber supply. (ER 673.)

Sawmills also tried to establish competing facilities. Regarding a proposed new sawmill on Annette Island, Mr. Brooks wrote to KPC's president (ER 674):

> Once in the area they no doubt plan simply to outbid everyone for enough logs to supply the mill which they can probably do, unless a combination effort by the local groups run them out.

In 1969 G-P executive Schmidbauer wrote to KPC Timber Manager Finney that "we are going to have problems making up our minds on how best to keep competition out . . ." (ER 675.) Three KPC executives wrote in 1970 concerning KPC's "preventing any potential bidder from obtaining additional sales to support a mill in the area." Mr. Merlo, their superior, replied stating his agreement with that objective. (ER 675-76.)

Defendants' concerted efforts to exclude competition were successful. (FF IX. 13; ER 668-76.)

I. The Single-Actor "Predatory Pricing" Cases Cited By Petitioners Are Not In Point

Defendants now argue that their preclusive bidding practices could only be probative if they had bid at levels which would make their purchase of timber result in a net dollar loss to them, *i.e.*, below marginal costs, citing such cases as *Janich Bros. Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), and *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976). The argument is totally misplaced. *Janich* and *Hanson* and other decisions of a like nature were limited attempt-to-monopolize cases which dealt with predatory pricing by a single actor; no allegations of concerted activity were involved. This is a conspiracy case, as was *American Tobacco Co.* v. *United*

States, *supra*, 328 U.S. 781 (1946), where this Court affirmed the criminal conviction under the Sherman Act on the basis, *inter alia*, of defendants' having bid on tobacco crops for the purpose of excluding competing cigarette manufacturers from access to raw material. The Court held that it made no difference whether the particular means employed were legal or illegal in themselves, because they became unlawful when employed as part of defendants' plan "to exclude actual or potential competition." *Id.* at 809. The Ninth Circuit in *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1035 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 57 (1982) has held that "to establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power," but the holding is simply irrelevant to the case at bar. *Inglis* too was a single-actor attempt-to-monopolize case. Here, by contrast, the allegations and proof were of conspiracy between the two pulp mill companies which dominated the market. There were neither allegations nor findings concerning the relationship of defendants' collusive exclusionary bidding practices to their costs, and none were necessary in view of the horizontal conspiracy to fix prices and exclude competitors which was amply proved by the evidence.

J. The Defendants Further Eliminated Mill Competition By Systematically Acquiring Ownership Or Control Of The Sawmills In Southeast Alaska

While concertedly excluding would-be entrants, KPC and ALP further eliminated mill competition by acquiring ownership or control of every major sawmill in Southeast Alaska. (FF X.A.1, ER 2435-6). The defendants' acquisi-

tion of other mills was part and parcel of their concerted bid-rigging and allocation of the market. Time after time, they deliberately froze the would-be competitor out of a log supply; then they acquired or took control of its facilities. *See* FF X.A.1-28, KPC App. A-53-7.

The would-be competitors which were unlawfully eliminated or controlled by the conspirators included Alaska Prince (to which Reid Brothers had been selling logs), Ketchikan Spruce Mills, Schnabel Lumber Company, Ed Head, Alaska Forest Products, and Alaska Wood Products. (FF X.A.1-X.B.3.) The destruction of Alaska Prince typified petitioners' methods. 699 F.2d 1297.

K. Pursuant To Their Conspiracy Defendants Deliberately Paid Artificially Low Prices To Loggers For Logs, And Eliminated Purchase Loggers From The Field; Legal Standards Applicable To Price-Fixing

The district court found that pursuant to their conspiracy the defendants paid artificially low prices to loggers for logs, and eliminated purchase loggers from the field. (FF XII.A.1-5.) The defendants paid only *administered* prices for logs—not free market prices. The prices were based on defendants' estimates of loggers' operating costs, not on log market values, and were calculated to keep loggers under the mills' control. The court has described these practices in FF XII.A.1-3 (KPC App. A-60.)

The defendants' artificial pricing system was collusive. (ER 713-730.) Each pulp mill could pay artificially low prices only on the basis that the other would reciprocally do the same. In refusing to compete for logs, each acted contrary to what its economic interest would have dictated had it behaved independently. Each could refrain from offering prices based on supply and demand only through their agreement not to compete against each

other and to exclude others who threatened to compete. The district court found (FF XII.A.4-5):

> 4. The defendants' systematic restraint of prices was interdependent. Each could, and did, impose artificially low prices upon loggers only on the basis that the other would do the same.
>
> 5. Had either defendant commenced to pay competitive log prices, the other would have been compelled to follow suit; but that did not occur.

Under the Sherman Act any combination or conspiracy which has the effect of raising, depressing, fixing, pegging or stabilizing the price of a product or service is illegal *per se*. It is not necessary that the participants in the conspiracy establish prices at specifically agreed levels. *Northern Pacific Ry. Co.* v. *United States*, *supra*, 356 U.S. 1, 5 (1958); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927). Price-fixing is equally unlawful whether it is direct or indirect, and whether it involves specific prices or only general agreement to raise, depress, or otherwise impede the actions of a free market. *United States* v. *General Motors*, 384 U.S. 127 (1966). Any combination which tampers with price structures constitutes an unlawful activity. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 222 (1940).

Combinations and conspiracies which have the effect of depressing, fixing or stabilizing the prices at which products are *purchased* are just as illegal as those affecting prices at which products are sold. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948); *Swift & Co.* v. *United States*, 196 U.S. 375 (1905); *American Tobacco Co.* v. *United States*, *supra*, 328 U.S. 781 (1946).

Here, the evidence shows overwhelmingly the correctness of the court's findings of price-fixing.

KPC deliberately paid loggers less than their expected costs, and then selectively made up the difference through "advances," keeping the loggers in debt. KPC's timber manager reported in 1967 (SER 124):

> [T]he independent logger cannot survive on our market price unless he has a very exceptional logging show and these are rapidly disappearing.

KPC did not change its log price for about ten years. (ER 714.) In 1969 its timber manager wrote to G-P (SER 140):

> Our published log prices are as follows but the fact of the matter is that few, if any, loggers could survive at these prices and we use all sorts of subterfuges to cover their cost of production, including charging off part of their mortgage accounts as we go along.

This program continued through the time covered by the evidence. (ER 715-726.)

ALP's log procurement prices, like those of KPC, were artificially low. The Minami Report, a detailed two-volume "Survey Report on ALP Woods Operations" issued in August of 1972, stated (in ALP's translation from the Japanese original, ER 715, SER 169):

> Acquisition of logs is made almost in all cases by the hands of contractors in the national lands. . . .
> [T]he contract price has been and is inappropriate and the deficit owing to this has been covered with growing advance money and, to make matters worse, new contracts for the following year have been made with rents [debts] not completely collected.

The report also noted that the prices were sometimes set at low levels to inspire "the loggers' effort" or because

ALP "consider[ed] it better to force them [to] continue operation at the low cost as a warning to other loggers." (SER 176-77.)

ALP, like KPC, deliberately kept prices below known logging costs. (ER 716-719.) The defendants' system of depressed prices resulted in the loggers accumulating massive debts. During the years 1968-73 KPC wrote off more than $3,000,000 in logger debts. (Ex. 1187.) As of September, 1973, ALP's total investment in loggers amounted to over $12.5 million; of that total, several million dollars represented operating loans made because prices were not covering the loggers' operating costs. (ER 718-19.)

KPC and ALP treated the logger bad debts as additional costs of procurement, in lieu of higher prices. (SER 132; ER 719: RT 12:15, 16.)

The defendants' use of non-price subsidies, debt forgiveness, and the like to keep selected loggers functioning was at KPC's or ALP's sole discretion. (ER 719-23.) Each defendant was aware of the other's use of administered prices. Mr. Brooks, for example, "surmised" that ALP was using essentially the same method as KPC did of paying prices below loggers' costs and then selectively forgiving debt afterward. (ER 723.)

One purpose of the concerted price restraint was to minimize procurement costs. Another was to avoid the creation of statistics which could increase stumpage prices. (ER 723.) In a letter to KPC's president, Mr. Brooks wrote (ER 724):

> [W]e are deterred from establishing a realistic log price by our fear that it will be reflected in Forest Service stumpage rates . . .

A further purpose was to enhance defendants' control of the industry. Neither defendant would allow a logger indebted to it to sell logs to another mill. (ER 724.) Defendants' below-cost pricing allowed them to control loggers by threatening to foreclose or cut off financing. (ER 724-725.) The pulp mill's cutting off a logger's financing ordinarily meant he was out of business. (ER 724-26.) A G-P memo stated, concerning loggers buying timber sales (Ex. 944): "This should be stopped and only KPC should buy and decide which loggers will do the job."

The result of defendants' collusive administered prices was the elimination of independent loggers and their replacement with defendant-owned or controlled companies. (FF XII.B.1-3.) This change was deliberately carried out by KPC and ALP although both defendants conceded that independent loggers were more efficient than defendant-owned or managed companies, and produced logs more cheaply. (ER 726-727.) The effects of defendants' practices on purchase loggers were devastating. In the earlier years, there were many independent purchase loggers; in the later years, defendants obtained almost all their supply from contract loggers. (FF IV.14; ER 2422.) Faced with the destruction of competition for their products, loggers had to take whatever one of the defendants would pay. (ER 727.) As logging companies went under, the defendants acquired the companies themselves or their assets. (ER 728-29.)

K. The District Court And Court Of Appeals Applied Standard Conspiracy Law

The law has long recognized that a conspiracy in violation of the Sherman Act may be tacit or express, may be proved by circumstantial or direct evidence (or both), and may be inferred from conduct. *See* Section E, *supra*. The district court applied these standard rules in concluding

that the evidence "overwhelmingly" established defendants' violations. (ER 2404.) The defendants' arguments concerning a "new theory of conspiracy," "opportunity evidence," and "conscious parallelism" are specious. Interdependence of the conspirators' conduct—*i.e.*, the fact that each can continue to refrain from competing only on the basis that the others reciprocate—is a long-recognized feature of collusion. *E.g.*, *Interstate Circuit* v. *United States*, *supra*, 306 U.S. 208 (1939); *United States* v. *Champion International Corp.*, *supra*, 557 F.2d 1220 (9th Cir. 1977), *cert. denied*, 434 U.S. 938. This is not a mere "conscious parallelism" case and even if it were, the "plus" factors are so abundant that liability is clear.[5] The

[5] "Conscious parallelism" is defined as a situation in which two or more companies follow similar courses of conduct *without intercommunication*. 1 von Kalinowski, *Antitrust Laws and Trade Regulations*, § 6.01[3]. The "plus" factors held sufficient to make it actionable have included the showing of a complex yet identical set of responses, direct communication or an opportunity for it, or a set of circumstances which made each participant aware that it was in its interest to participate if all did, but adverse to its interest to participate if others did not. L. Sullivan, *Handbook of the Law of Antitrust*, pp. 317-318; *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971); *Bogosian* v. *Gulf Oil Co.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). Where the circumstantial evidence goes beyond mere parallel behavior, and includes other factors which suggest collusion, the evidence is sufficient to warrant a finding of conspiracy. *See, e.g.*, *C-O Two Fire Equip. Co.* v. *United States*, 197 F.2d 489 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952); *Milgram* v. *Loew's Inc.*, 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929. Consciously parallel business behavior is always admissible as evidence of underlying agreement, combination or conspiracy, and the probative value of such evidence is to be determined by the trier of facts. *Theatre Enterprises Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540, 541 (1954); *Standard Oil Company of California* v. *Moore*, 251 F.2d 188, 210, 211 (9th Cir. 1958); *Pittsburgh Plate Glass Co.* v. *United States*, 260 F.2d 397 (4th Cir. 1958).

cases on "social friendships" and "mere opportunity" are simply inapposite.[5] The defendants here conspired and monopolized through their actions and words in the timber industry—not through social conversations.

CONCLUSION

For the reasons stated above and in respondent's brief in opposition in Cause No. 83-301, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] In *American Tobacco Co. v. United States*, 328 U.S. 781, 793 (1946), the Court stated: "A friendly relationship within such a long established industry is, in itself, not only natural but commendable and beneficial *as long as it does not breed illegal activities*. Such a community of interest in any industry, however, provides a natural foundation for working policies and understandings favorable to the insiders and unfavorable to outsiders." (Emphasis added.)